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August 4, 2006

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Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Written Ex Parte Presentation

**Re: Reply to NTCA Opposition to 8x8, Inc. Request for Expedited
Approval of Traffic Study
WC Docket No. 06-122**

Dear Ms. Dortch:

8x8, Inc. ("8x8"), by its undersigned counsel, hereby replies to National Telecommunications Cooperative Association's ("NTCA's") July 25, 2006 written *ex parte* opposition to 8x8's "Request for Expedited Approval of Traffic Study" and "Request of 8x8, Inc. to Withhold Information from Public Inspection" filed on July 18, 2006. In its opposition, NTCA claims that 8x8 did not submit its requests on a timely basis, that 8x8's traffic study should be made public, and that the traffic study does not comply with the Commission's recently adopted requirements.

As explained below, 8x8 submitted its requests on a timely basis, the information that 8x8 is requesting to be withheld from public inspection is business proprietary information of the type that is normally withheld from public inspection, the methodology used by 8x8 to conduct its traffic study complies with the Commission's recently adopted requirements, and 8x8 would be prejudiced if it does not receive a determination from the Commission on a timely basis.

Timeliness of 8x8 Submission

The Commission released the full text of its *VoIP USF Order*¹ on June 27, 2006 extending USF reporting and contribution obligations to interconnected VoIP providers, and requiring all such interconnected VoIP providers to file the FCC Form 499Q on August 1, 2006.² The *VoIP USF Order* provides interconnected VoIP providers three alternatives by which to report their interstate telecommunications revenue: (1) default to a 64.9 percent interim safe harbor; (2) use actual interstate telecommunications revenue figures; or (3) rely on a Commission-approved traffic study to estimate interstate telecommunications revenue.³

Because the 64.9 percent interim safe harbor for interstate revenues overstates 8x8's subject revenues, and because 8x8 was unable to determine actual interstate revenue, 8x8 was left with the third alternative, which was to conduct and receive Commission approval of a traffic study prior to August 1, 2006. Since the full text of the *VoIP USF Order* was not released until June 27, 2006, that left 8x8 with only 34 calendar days to read and understand the *VoIP USF Order*, design, conduct and analyze the results of the traffic study, prepare a report of the traffic study for submission to the Commission, and receive Commission approval of the methodology. By acting expeditiously, 8x8 was able to undertake each of these tasks and submit the traffic study to the Commission on July 18, 2006, only 21 calendar days after the release of the full text of the *VoIP USF Order*. Accordingly, 8x8's submission was clearly timely.

8x8 has Provided Ample Justification for Confidential Treatment

Contrary to the claims of NTCA, the Request of 8x8, Inc. to Withhold Information From Public Inspection (the "Confidentiality Request") complies with each of the requirements of Section 0.459(b) of the Commission's Rules, 47 C.F.R. § 0.459(b).

(1) 8x8 identified the specific information for which confidential treatment is sought. Specifically, the information regarding 8x8's methods and calculations used to complete the traffic study.

(2) 8x8 identified the Commission proceeding.

¹ *In the Matter of Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-94, rel. June 27, 2006 ("*VoIP USF Order*").

² *VoIP USF Order*, ¶ 60.

³ *See VoIP USF Order*, ¶ 52.

(3) 8x8 specifically explained the degree to which the information is commercial or financial. There is no question that minutes of use, revenue, and traffic distribution is commercial and financial information.

(4) 8x8 explained the degree to which the information concerns a service subject to competition. It is beyond dispute that interconnected VoIP service is a competitive service, and that information such as minutes of use, revenues and traffic distribution is competitively sensitive information.

(5) 8x8 fully explained how disclosure of the information could result in substantial competitive harm. 8x8 explained that the information concerning minutes of use and traffic distribution as well as the confidential methodology of the study is commercially sensitive and protected by Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d). 8x8 further explained that the information for which protection is sought may serve as the basis of 8x8's information to be reported on 8x8's FCC Form 499-Q. The Commission routinely treats the information provided on the Forms 499-Q and 499-A as confidential, and does not make such information available to the public. It is axiomatic that the underlying information that forms the basis of the information reported in the Form 499-Q is equally confidential.

(6) 8x8 also explained that it does not publicly disclose its minutes of use, its traffic distribution, or its methodology for deriving its traffic distribution, that such information is held in the strictest confidence, and that it is disclosed only to those who have an obligation to maintain the information's confidentiality. While 8x8 is publicly-traded, it does not reveal the information provided in the traffic study with that level of granularity.

(7) 8x8 also explained that it has not made the information available to the public, and that information required to be disclosed in public filings is not as specific and granular as the information provided to the Commission.

(8) Lastly, 8x8 justified its request that the information not be made available to the public for a minimum of three years on the grounds that release of the information would cause substantial competitive harm because it would allow competitors to know in detail the minutes of use, traffic distribution, and traffic distribution methodology of 8x8.

In short, as is plainly evident from the initial request for confidential treatment, 8x8 has fully complied with each of the requirements of Section 0.459(b), and NTCA's claims to the contrary are wholly without merit.⁴

⁴ All contributors rely on underlying data and methodologies in order to forecast revenue subject to USF. Many wireline carriers, such as NTCA's own members, provide "actual" interstate revenue projections for bundled telecommunications service offerings. (continued)

8x8's Traffic Study Methodology is Appropriate and NCTA's Objections Must be Reserved for Comments on the Further Notice

Contrary to the claims of NTCA, 8x8 demonstrated that its traffic study was "designed to produce a margin of error of no more than one percent with a confidence level of 95%."⁵ 8x8 provided the Commission with sufficient information to review the validity of 8x8's assumptions, data collection methods, sampling techniques and calculations.

As explained earlier, subject to the time constraints resulting from the release date of the *VoIP USF Order*, 8x8 rapidly provided its information to the Commission. It is up to the Commission, and not NTCA to decide whether the Commission has sufficient time to review the information submitted by 8x8. NTCA is not a regulatory agency established by Congress. It is an advocacy organization for telephone cooperatives, and cannot speak for the Commission.

Whether the traffic study meets the required statistical significance is a simple matter of performing the proper calculations, and the Commission has been given the information regarding the population size and sample size necessary to determine the study's compliance with the requisite Commission standards as outlined in the *VoIP USF Order*. Because the population size, is the amount of 8x8's traffic, is itself confidential as detailed above, this information cannot be made publicly available.

The Commission has identified the method in which traffic studies are conducted by the industry as a whole as an issue on which comment is being sought in response to the further rulemaking announced by the *VoIP USF Order*. It is not appropriate for NTCA to use 8x8's study as the opportunity to comment on that issue. Rather, NTCA should make any industry-wide comments it has on traffic study methodology through properly filed comments as requested in the *VoIP USF Order*.

The methodology used to determine which part of the bundles are subject to USF are not subject to public review and comment. Likewise, cellular carriers that choose to rely on traffic studies are required now to file such studies with the Commission. Should the Commission deny 8x8's request for confidential treatment and seek public comment on the Company's traffic study, there would be no principled basis to not subject all such data from all carriers to public inspection, notice and comment. Clearly, such massive disclosure of highly confidential information is not in the public interest nor justified under the FCC's rules.

⁵ *VoIP USF Order*, ¶ 32, n.115.

Further Delay of Approval will Cause Prejudice to 8x8

Lastly, 8x8 would be prejudiced if the Commission does not rule on the adequacy of 8x8's traffic study methodology in a timely manner. Because the 64.9 percent interim safe harbor for interstate revenues substantially overstates 8x8's interstate revenues, if 8x8 were to use the safe harbor, it would end up paying a higher USF contribution than it would pay if it could rely on traffic studies. 8x8's customers would be harmed as they would be assessed a USF surcharge at a rate that does not accurately reflect their interstate use as a whole. Although NTCA argues that 8x8 would have an opportunity to revise its Form 499-Q if the Commission were to approve 8x8's traffic study methodology after August 1, 2006, 8x8 would be limited to revising its Form 499-Q within 45 days of the filing date.⁶ After that date, true-ups would be limited to filing the Form 499-A on April 1, 2007, with actual refunds not occurring until the 3rd quarter 2007, essentially an entire year from now. Meanwhile, 8x8's service would not be as competitive in the marketplace due to the increased costs to consumers based on an artificially inflated USF calculation.

Moreover, the Form 499-A filing does not present a satisfactory solution for two reasons. First, the cash paid by 8x8 for its excess USF contributions will have been tied up for nearly a year. That in itself could adversely impact 8x8. Second, 8x8 would not receive full credit for its excess contribution, because excess contributions are refunded by using the average contribution rate for the two quarters with the lowest USF rate for the year.⁷ If the quarter being reported on August 1 ends up having a higher contribution rate than the average of the two lowest quarters, 8x8 would end up not being made whole. Such a result is unjust, as the Commission created this true up methodology to encourage accurate reporting.⁸ In this instance, 8x8 is able to report more accurately than the safe

⁶ Telecommunications Reporting Worksheet, FCC Form 499-Q, Instructions, section II.E, page 9.

⁷ *Federal-State Joint Board on Universal Service*, CC 96-45, Report and Order and Order on Reconsideration, (Rel. Mar. 14, 2001) at ¶ 12 ("Quarterly Contribution Order"); *See, also, Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13, 2002), at ¶ 36 ("2002 Interim Order").

⁸ *Quarterly Contribution Order*, at ¶ 12; *2002 Interim Order*, at 36.

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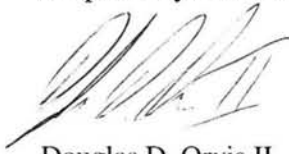
harbor, but is being denied that opportunity by the requirement to use the safe harbor pending approval of the traffic study.

Therefore, if the Commission does not rule on 8x8's traffic study methodology prior to the revision deadline for the August 1, 2006 Form 499-Q, 8x8 and its customers would still be prejudiced.

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Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Orvis II", is written over the typed name.

Douglas D. Orvis II
Ronald W. Del Sesto, Jr.

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cc: Thomas Navin
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